IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.1826 OF 2005

IN

SUIT NO.3197 OF 1988

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The New Bandra Hill Co.op.
Hsg.Society Ltd. ...Plaintiff

v/s.

M/s.Ambit Corpn. & Ors. ..Defendants

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Mr.A.Y.Bookwala with Mr.S.S.Purohit i/b Dhruve Liladhar & Co. for the Plaintiff.

Mr.Virag Tulzapurkar with Mr.Chetan Kapadia i/b DSK Legal for the Defendants.

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CORAM: D.K.DESHMUKH, J.

DATED: 8TH MARCH,2007

P.C.:

1. This Notice of Motion is taken out by the Plaintiffs. The facts that are material and relevant for deciding this Notice of Motion are that admittedly the Defendant No.1 was the owner of the land which is described in the agreement at Exh.B to the plaint. Defendant No.3 Mr.C.T.Chandiramani was the chief promoter of the Plaintiffs/society. In his capacity as promoter he entered into an agreement with the owner of the land, whereunder for the consideration which was agreed and was to be paid the owner was to construct a multi-storeyed building on the land. The members of the Plaintiffs/society were to occupy the flats constructed in the building and thereafter in favour of the Co.operative Society of the flat purchasers the land with the building was to be conveyed by the owners. However, it was provided that on the land there is one bungalow standing which is called "Merchant Bungalow" and outhouse. There were agreements entered into with the individual flat owner also. In that agreement it was provided that

in case the building is constructed on the land occupied by Merchant Bungalow, the flat purchasers in that building will become members of the Plaintiff/society. This condition was imposed because under the first agreement the entire land was to be conveyed in favour of the Plaintiff/society.

. Initially the suit was filed against the Defendants Nos.1, 2 & 3. It appears that during the pendency of this suit, the owners entered into an agreement with the Defendant No.4 and transferred their rights in the property in favour of Defendant No.4. The Plaintiffs, thereafter, amended the plaint and joined Defendant No.4 as a party to the suit and also included a prayer for setting aside the conveyance executed by Defendant No.1 in favour of Defendant No.4. It is pertinent to note here that in the agreement that is entered into between the Defendant No.1 and Defendant No.4 the present suit which was pending at that time has been specifically referred to. Therefore, it can be safely said that the Defendant No.4 entered into transaction with Defendant No.1 being fully aware of pendency of the suit.

2. The present Notice of Motion has been taken out by the Plaintiffs basically to restrain the Defendant No.4 from carrying out any further construction and development on the land in addition to the construction of the building on the land occupied by Merchant bungalow and the outhouse. It may be pointed out here that it is common ground that the Merchant Bungalow has been demolished and in its place a multi-storeyed building has been put up. Presently building is unoccupied and except for some marginal work to be carried on the building is complete. The present notice of motion has been taken out by the Plaintiff to restrain the fourth Defendant from putting up any additional construction on the land. According to the Plaintiffs, the Defendant No.4 is taking steps to put up additional building on the land because according to the Defendant No.4 some of the land from the plot is reserved for putting up a building for housing project affect persons and therefore, he is entitled to take up construction of that building. According to the Plaintiffs, in view of the agreement between the parties the Defendant No.4 who steps into shoes of Defendant No.1 is not entitled to carry on construction of any building save and except the

building on the land on which the Merchant bunglow and outhouse was standing. According to the Defendant No.4, as against the Defendant No.4 firstly this suit is barred by the law of limitation. It is also the case of the Defendant No.4 that the agreement between the Defendant No.1 and flat purchasers contemplates one or more buildings coming up on the land after completion of the construction of the building of the Plaintiffs/society and therefore, according to the Defendant No.4, Defendant No.4 can construct more buildings after completing the construction of the building on the land occupied by Merchant bungalow and outhouse. It was also submitted that the prayer made in the suit for setting aside the conveyance in favour of the Defendant No.4 executed by Defendant No.1 is also barred by the law of limitation.

3. I have heard the learned Counsel for both sides. In the agreement at Exh.B one finds two recitals which are relevant for the purpose of deciding this Petition. They are contained in clause 1 and clause 11 of the agreement. They read as under:-

1. The Developers shall construct for and

give to the Purchaser, as and by way of a Package Deal, the said land described in the First Schedule hereunder written together with the new multi-storeyed building to be constructed by the Developers thereon. The Developers shall (after the necessary permission under the Law are allowed) at the request of the Purchaser get the conveyance executed in favour of the said Society when registered in respect of the said land more particularly described in the First Schedule hereunder written. As part of the Package Deal arrangement, the Developers shall construct thereon and complete the building of Ground Floor on stilts and 8 or more Upper floors consisting of 48 flats, garages and car parking spaces, as per the plans prepared by Shri Ajit Badlani and Shri K.G.Kapadia, Architects, and sanctioned by the Municipal Corporation of Greater Bombay. It is expressly understood and agreed that the Developers shall be entitled to demolish the existing old bungalow and out-houses after getting the same vacated and put up a new construction in its place.

> 11. It is expressly understood and agreed by the Purchaser that the Developers have agreed to get the Conveyance executed of the said plot bearing No.5 C.T.S. No.1365, 1366, 1367 and 1368 more particularly described in the First Schedule hereunder written in favour of the said Society, when registered, for the consideration hereinabove mentioned, on the express understanding and Agreement that the contract of construction herein contained is irrevocable and the conveyance of the said land and the construction of the said building have been agreed by way of a package Deal and consequently the Purchaser or the said Society shall not be entitled to require or obtain the Conveyance of the said land without being bound and liable to be constructed by the Developers as per the terms of this Agreement.

4. Perusal of above clauses shows that one building on the land was to be constructed for the purpose of the Plaintiff/society and the Developers had reserved the right to construct a building on the land occupied by Merchant Bungalow and out-house. It is

further clear that the entire plot was to be transferred in favour of the society. Thus, it is clear from the above said clauses that after completing the construction of a building for the Plaintiff/society, save and except the rights of the developers to construct a building on the land occupied by Merchant bungalow and out-house, the Defendant No.1 did not have any right in relation to the land which is subject matter of the agreement at Exh.B. Clause 2 of the agreement at Exh.C between the Developers and the individual flat purchaser is also relevant. It reads as under:-

> (2) The Builder has informed the flat purchaser that there is an old bungalow and out-house in the said property at present occupied by the tenants. If at any time and Builder succeeds in getting the said old bungalow and out-house vacated, the Builder shall alone be entitled to demolish the said old bungalow and the outhouse and put a new construction in its place. The Builder shall in such event be entitled to sell the flats in such Building at their absolute discretion and such flats holder shall be entitled to become

the members of Bandra Hill Co.operative Housing Society Ltd.(Proposed). The flat holder hereby gives his express consent for the same.

5. Thus, this clause contemplates the builder constructing a new building on the land occupied by Merchant bungalow and the out-house and the flat purchasers in that building becoming members of the Plaintiff-society. This was necessary because under the agreement at Exh.B the entire land was to be transferred in favour of the Plaintiff-society, therefore the flats purchasers in the building constructed on the land occupied by Merchant bungalow will have of necessity to become the members of the Plaintiff-society. Really speaking after the construction of the Plaintiff-society's building was completed, the Defendant No.1 was under an obligation to convey the land to the Plaintiff-society subject to reservation of rights in his favour of constructing and selling the building on the land occupied by Merchant bungalow, but the Defendant No.1 did not do it. Therefore, the present suit was filed. Therefore, the transfer effected during the

pendency of the suit by Defendant No.1 in favour of Defendant No.4 will only be of the rights of the Defendant No.1. The Defendant No.4 could not have acquired anything in excess of what the Defendant No.1 had. Therefore, if the Defendant No.1 did not have any right to raise any construction on the land except constructing building on the land occupied by Merchant bungalow, the Defendant No.4 who is the transferee from the Defendant No.1, could not have acquired that right. Defendant No.4 is really the purchaser during the pendency of the suit. Therefore, for setting aside the conveyance executed in his favour, he does not become necessary party to the suit. If the suit of the Plaintiff is decreed against the Defendant No.1, everything done by the Defendant No.1 during the pendency of the suit will fall to ground, because it will be hit by doctrine of lis-pendes. Even for restraining the Defendant No.4 from raising any construction of the land, the Defendant No.4 does not become the necessary party. Because the Defendant No.4 is a party who is claiming through the Defendant No.1. The Plaintiffs have privity of contract with the Defendant No.1, therefore, the Plaintiffs can claim for order of temporary injunction against the Defendant No.1 and

the persons claiming through him. Status of Defendant No.4 is nothing more than the person claiming through the Defendant No.1. It is obvious from the material available on record that the Defendant No.1 was not entitled to raise any construction on the land except constructing a building for the Plaintiff-society and one building on the land occupied by Merchant bungalow and out-house. Any obligation that the owner of the plot may owe to the Planning Authority will be owed by the Plaintiff-society because it is the Plaintiff-society which is the owner of the land. If the Defendant No.4 finds that as owner of the land he is to perform certain obligations unto Planning Authority, it is for him to convey the property to the Plaintiff-society which would be the rightful owner of the land and would be liable to perform any obligation that may be imposed by law on the owner.

6. Looking at the matter from any point of view, Defendant No.4 is not entitled to raise any additional construction on the land. In my opinion, there is one more reason why the order of temporary injunction should be made against the Defendant No.4 from raising any additional construction, the reason

is that the Defendant No.4 is a builder. He will be raising construction on the land for the purpose of sale. Once he raises the construction, third party rights will be created, as prima facie I find he is not entitled to raise any construction. If the Defendant No.4 is permitted to raise any construction, interest of unsuspecting flat purchasers would be adversely affected.

7. Taking overall view of the matter, therefore, in my opinion, the Plaintiffs are entitled to temporary injunction restraining the Defendant No.1 and any person claiming through him including Defendant No.4 from raising any construction on the land which is the subject matter of the suit, save and except completing any work that may be incomplete of the building that has been constructed on the land occupied by Merchant bungalow and out-house. It is clarified that the Defendant No.4 will be entitled to take all steps that may be necessary in law for completing the construction of the building on the land occupied by Merchant bungalow and out-house for getting occupation certificate and giving possession of the flats to the persons who might have purchased the flats in the building. However, the Defendant

No.4 shall supply to the Plaintiff-society a flat purchase agreement/allotment letter entered into by the Defendant No.4 in favour of the flat purchasers with full details to the Plaintiffs/society.

. Notice of Motion disposed of.

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